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In the Supreme Court of the United States

OCTOBER TERM, 1979

WINNEBAGO TRIBE OF NEBRASKA, PETITIONER

v.

COL. JAMES W. RAY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Army Corps of Engineers violated the National Environmental Policy Act by limiting its consideration of the impact of a power line to the river-crossing area only, where the sole federal involvement in the project was the Corps' issuance of a permit to the power company to construct a portion of the line over that navigable waterway.

2. Whether petitioner carried its burden of raising a significant environmental issue concerning the effect of the river-crossing portion of the power line on bald eagles.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 621 F. 2d 269. The opinion of the district court (Pet. App. 13-21) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 1980. The petition for a writ of certiorari was filed on June 11, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1975, the Nebraska Public Power District (NPPD) and the Iowa Public Service Company (IPS) undertook a project to build a 67-mile power transmission line from the IPS Raun Substation in Iowa to an NPPD substation near Hoskins, Nebraska. On January 10, 1979, the Army Corps of Engineers issued a permit to IPS to construct the line across the Missouri River approximately 150 feet south of a similar power line owned by the Omaha Public Power District.[1] Prior to granting the permit, the Corps determined, based on an Environmental Effect Assessment,[2] that an Environmental Impact

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[1]Under Section 10 of the Rivers and Harbors Appropriation Act of 1899, ch. 425, 30 Stat. 1151, 33 U.S.C. 403, a permit is required in order to build a structure, such as the transmission line at issue here, over navigable waters. See 33 C.F.R. 322.5(i) (1978). IPS applied for the permit because it was responsible for constructing the river-crossing part of the line. The line was planned to begin in Iowa, cross the river, and run most of its distance through Nebraska.

[2]Under Corps regulations in effect at the time the permit was issued, the District Engineer could issue a declaration that no EIS was necessary if he determined on the basis of an Environmental Effect Assessment that a proposed action would not have a significant impact on the quality of the human environment. See 33 C.F.R. 209.410(d)(2)(ii), 325.2(a)(4) (1978). See also 33 C.F.R. 209.410, 320.3(d), 325.4 (1978).

Statement (EIS) was not required under the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.* (Pet. App. 2-3, 13-15).

The Environmental Effect Assessment issued by the Corps (Pl. Exh. 6) considered the impact of the 1.25-mile portion of the power line that crossed the river. The Assessment described the proposed construction and maintenance of two steel towers connected across the river by transmission wires, the probable environmental consequences, any feasible alternatives, and the basis for the conclusion that no significant environmental impact would result. Although American bald eagles were not specifically mentioned, the Assessment noted, among other things, that the proposed project was not expected to have a long-term detrimental effect on the wildlife in the area, including several species of birds (Pl. Exh. 6 at 1-2). The Assessment concluded that an EIS was not required because no significant environmental impact was associated with the river-crossing project (Pet. App. 2-3, 14-15).

2. On April 30, 1979, petitioner brought the present action in the United States District Court for the District of Nebraska, contending that the Corps violated Section 102(2)(C) of NEPA (42 U.S.C. 4332(2)(C)) when it issued the permit to IPS without preparing an EIS. In particular, petitioner claimed that the Corps should have prepared an EIS on the entire 67-mile span of the line rather than limiting its consideration to the river-crossing area only, and that the Corps' Environmental Effect Assessment was inadequate because it did not assess the impact of the line on the bald eagle. Petitioner sought to enjoin NPPD and IPS from constructing the line and condemning land in connection with the project (Pet. App. 3, 13-14, 15).

Following a three-day trial, the district court concluded that the Corps had acted reasonably in issuing the permit

without preparing an EIS (Pet. App. 13-21). The court of appeals affirmed (*id.* at 1-12).

ARGUMENT

1. Several considerations suggest that this case is not of sufficient continuing importance to warrant review by this Court. First, in holding that the construction of the entire line was not a secondary or indirect effect of the permit, the court of appeals relied (Pet. App. 10) on guidelines issued by the Council on Environmental Quality (CEQ). See 40 C.F.R. Part 1500 (1978). These guidelines have now been superseded by binding regulations. See 40 C.F.R. Part 1500 (1979); *Andrus* v. *Sierra Club*, 442 U.S. 347, 357 & n.16 (1979). Since CEQ's regulations are entitled to "substantial deference' in interpreting NEPA (*id.* at 358), this change renders the decision below of limited precedential value.

Moreover, with respect to petitioner's assertion that the administrative record is inadequate because of the failure specifically to consider the bald eagle (Pet. 15-16), the Corps has now prepared an Addendum to Findings of Fact (App. A, *infra*), and an Environmental Effects Assessment Supplement (App. B, *infra*) to evaluate the effect on the bald eagle of the river-crossing project.[3] Based on this review, the Corps has determined that there will be no significant effect on the species. Cf. *Warm Springs Dam Task Force* v. *Gribble*, 621 F. 2d 1017, 1025-1026 (9th Cir. 1980).[4]

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[3]This Supplement was prepared pursuant to Section 7 of the Endangered Species Act, 16 U.S.C. (Supp. II) 1536(a)-(d).

[4]We also note that the river-crossing portion of the power line has now been completed. Condemnation proceedings to acquire the right of way for the line are underway. See *Nebraska Public Power District* v. *100.95 Acres of Land, Etc.*, Civ. No. 79-0-411 (D. Neb. filed Sept. 12, 1979).

2. In any event, the decision below is correct and does not conflict with any decision of this Court or of the other courts of appeals.

a. The court of appeals properly rejected petitioner's claim that the Corps acted unreasonably in limiting its consideration of potential environmental impact to the river-crossing portion of the power line. The requirements of NEPA are to be construed in light of a "rule of reason." See, *e.g., Sierra Club* v. *Froehlke,* 534 F. 2d 1289, 1299 (8th Cir. 1976); *Harlem Valley Transportation Assoc.* v. *Stafford,* 500 F. 2d 328, 337 (2d Cir. 1974); *NRDC* v. *Morton,* 458 F. 2d 827, 837 (D.C. Cir. 1972). Only if it was unreasonable may the Corps' EIS decision be reversed. See, *e.g., Monarch Chemical Works, Inc.* v. *Thone,* 604 F. 2d 1083, 1087-1088 (8th Cir. 1979); *Texas Committee on Natural Resources* v. *Bergland,* 573 F. 2d 201, 206 (5th Cir. 1978); *Minnesota Public Interest Research Group* v. *Butz,* 498 F. 2d 1314, 1320 (8th Cir. 1974) (en banc) (*MPIRG I*). And, in reviewing an agency's determination, "[t]he task of the court is not to decide where to draw the line, but to review the matter to ascertain whether the agency has made a reasonable choice." *Swain* v. *Brinegar,* 542 F. 2d 364, 369 (7th Cir. 1976). See also *Kleppe* v. *Sierra Club,* 427 U.S. 390, 410 n.21 (1976).[5]

In view of the " 'federal action' being taken" here (*Kleppe* v. *Sierra Club, supra,* 427 U.S. at 402 n.14, quoting *Aberdeen & Rockfish R. Co.* v. *SCRAP,* 422

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[5]While NEPA establishes significant substantive goals for the Nation, the duties it imposes upon agencies are "essentially precedural." *Stryckers Bay Neighborhood Council* v. *Karlen,* No. 79-168 (Jan. 7, 1980), slip op. 4-5; *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519, 558 (1978). Here, petitioners have not shown that the procedural requirements of NEPA were not met.

U.S. 289, 322 (1975)), the court of appeals correctly upheld the reasonableness of the Corps' decision to consider only the river-crossing portion of the power line.[6] The power-line project is a joint venture between two public utilities, with no federal financing or other participation. The sole federal involvement in this project is the Section 10 permit to cross the river.[7] Under the now-superseded CEQ guidelines, this limited degree of federal involvement supported the Corps' determination concerning the geographic scope of the environmental

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[6]We also note that NPDD, although not required to do so, had prepared an environmental assessment for the proposed line (Def. Exh. 109). This assessment was made available to the public and was delivered to the offices of the Bureau of Indian Affairs in Winnebago and to petitioner's tribal council. At trial, petitioner failed to show that the 67-mile power-line project, even considered in its entirety, could significantly affect the quality of the environment. See *MPIRG I, supra,* 498 F. 2d at 1320.

[7]For this reason, the "highway segmentation" cases such as *Indian Lookout Alliance* v. *Volpe,* 484 F. 2d 11 (8th Cir. 1973), on which petitioner relies (Pet. 13-14), are inapposite. In those cases, it was alleged that federally-funded projects were "segmented" rather than considered in their entirety, thereby preventing meaningful NEPA review of the "federal action." No comparable situation is presented here.

Nor is this case analogous to *Greene County Planning Board* v. *FPC,* 455 F. 2d 412 (2d Cir.), cert. denied, 409 U.S. 849 (1972), and similar decisions cited by petitioner (Pet. 15, 17). A federal agency may be required to assess the impact of a project as a whole when it issues a permit for the complete project or otherwise associates itself with the entirety of the project in a substantial way. Here, however, the Section 10 permit was not necessary to the construction of the power line and was only an incidental aspect of the project in order to allow the line to cross the river.

Finally, insofar as petitioner relies (Pet. 10-15) on Eighth Circuit cases such as *MPIRG I* to support its contention that the decision below conflicts with other court of appeals decisions, this assertion of an intra-circuit conflict is not a ground for review by this Court. See *Wisniewski* v. *United States,* 353 U.S. 901 (1957).

assessment. In the circumstances of this case, it was proper for the Corps to focus on the impact of the activity it had authorized—the power line's crossing of the navigable river.[8]

b. The courts below also correctly held that petitioner had not shown that the river-crossing portion of the power line could significantly affect the bald eagle. After reviewing the evidence introduced at trial, the district court specifically found (Pet. App. 20) that the existing Omaha Public Power District line had not detrimentally affected bald eagles in the area and that petitioner failed to establish that the proposed NPPD-IPS power line posed a substantial threat to the eagle.[9] The court of appeals sustained this finding "on the basis of [the] evidence" (*id.* at 12). Further review of this fact-bound issue is unwarranted. See, *e.g.*, *Branti* v. *Finkel*, No. 78-1654 (Mar. 31, 1980), slip op. 5 n.6; *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635-636 (1967); *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949).

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[8]Petitioner also argues (Pet. 14, 16) that the Corps did not adequately consider alternatives to the project. This claim was not raised in the complaint or considered by the district court, however, and the court of appeals correctly concluded (Pet. App. 10-11) that it was therefore not presented for review. See, *e.g.*, *United States* v. *Mitchell*, No. 78-1756 (Apr. 15, 1980), slip op. 11 n.7; *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976). In any event, the Assessment contains an adequate discussion of three alternatives, including the possibility of no action (Pl. Exh. 6 at 2-3).

[9]This finding was amply supported by the evidence. See, *e.g.*, Trial Tr. 92-94, 97, 102. In addition, as stated above (see note 6, *supra*), NPDD had voluntarily prepared an environmental assessment for the project that revealed no adverse effect on the eagle. And this conclusion is confirmed by the Corps' Environmental Effects Assessment Supplement (see page 3, *supra*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1980

DOJ-1980-08

APPENDIX A

ADDENDUM TO FINDINGS OF FACT

for Iowa Public Service Company

IA - NE 2SB OXT 1 001664

Project: Overhead Transmission Line across the Missouri River Mile 718.65C

Applicant: Iowa Public Service Company

Subject: Amend FOF to include facts concerning Threatened or Endangered Species

In order to determine possible impacts to the peregrine falcon and the bald eagle, the Corps solicited comments from the Fish and Wildlife Service regarding the need for a biological assessment pursuant to Section 7(c) of the Endangered Species Act. By letter dated 9 August 1979 the Fish and Wildlife Service stated that they do not believe the project is a major Federal action; and, therefore, a biological assessment is not required. They did state, however, that it is the Corps' responsibility under Section 7(a) of the Act to determine whether or not any endangered species will be affected by this action and that if the Corps determines it "may effect" those species, formal consulation should be initiated. Concluding, the letter stated that the bald eagle and peregrine falcon could occur in the project area (attachment 1). In compliance with Section 7(a) of the Endangered Species Act, a supplement to the Environmental Effects Assessment was prepared which determined that the project does not jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse

modification of habitat to such species (attachment 2). Accordingly, formal consultation with the Fish and Wildlife Service will not be initiated.

_____

date

V. D. Stipo
Colonel, Corps of Engineers
District Engineer

APPENDIX B

DA Permit No. IA-NE 2SB OXT 1 001664
Iowa Public Service Company
Overhead Cable Crossing
Missouri River (Mile 718.65C)

ENVIRONMENTAL EFFECTS ASSESSMENT SUPPLEMENT

In compliance with Section 7(a) of the Endangered Species Act, the following addendum has been prepared for the original Environmental Effects Assessment:

Though a variety of wildlife is found in the project area, only two species, the peregrine falcon and the bald eagle, have ranges that extend to this region. Of these, the peregrine falcon is considered an occasional migrant in the area and is only rarely seen. The bald eagle, however, is a frequent visitor in this reach of the Missouri River floodplain. Bald eagle sightings taken from the Snyder Bend area, approximately 2 miles downstream of the proposed crossing, indicate the birds first appear in late December. During the winter months it is not uncommon for 20-25 eagles to take up residence in this area. The number of eagles usually peaks in mid-March with the annual spring migration. At this time, as many as 80 eagles have been observed at Snyder Bend. There are, however, no known instances of bald eagles nesting at or near this location. Though inclusion of the transmission lines into the present environment would increase the probability of an eagle striking a line resulting in injury or death, the overall impact to the bald eagle population would be insignificant. Furthermore, the proposed lines are situated very close to an existing 345 kV line (mile 718.3) and is located in an area that is predominantly industrialized. As such, use of the immediate area by wintering or migrating eagles would be low. It has also been determined that construction activities would not

affect food resources or winter habitats of the bald eagle. Due to the extremely rare occurrence of the peregrine falcon in this area, this species will not be affected. The project does not, therefore, jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of habitat of such species. Several mitigative measures can be incorporated into construction design to lessen potential adverse impacts to bald eagles. First, lines on the proposed crossing should be installed at exactly the same elevation as the lines on the existing 345 kV crossing. This would reduce the probability of a bald eagle, or any other avifauna, from colliding with the lines. Secondly, orange or red ball markers should be installed. This would render the lines more detectable to eagles during times when line collissions are likely (i.e. adverse weather conditions such as blizzards or thunderstorms when visibility is reduced).

Prepared by: Michael Freel
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Concur: V. D. Stipo
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